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JUN 7 1972
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Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-1123.

JOSEPH V. RAFFERTY AND
MARGARET M. RAFFERTY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION.

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The views expressed in the brief for the respondent in opposition distort the issues in this case and necessitate that the following points be discussed:

1. The Government's brief in opposition (pp. 5-6) acknowledges the increase in Teragram's activities in 1964 and 1965, yet concludes that it was not actively conducting a trade or business for five years prior to the distribution of its stock. Teragram started small, acquiring and leasing the East Longmeadow plant in 1960. In 1964 and 1965 it expanded its activities by acquiring, financing, building and leasing a second plant at Waterbury.

The Government's view would allow a company to rise to the status of being actively conducted only after a second series of events. This view is totally out of touch with business reality. A business owning one piece of property, office or store can be as actively conducted as any conglomerate.

2. The Government has obscured the relevance and significance of *Estate of Parshelsky* v. *Commissioner of Internal Revenue*, 303 F. 2d 14 (C.A. 2) on the "active conduct of a trade or business" issue. The Government is correct in stating that section 112(b)(11) of the 1939 Code (Pet. App. 37) did not require the active conduct of a trade or business for five years prior to distribution and that the taxpayers in *Parshelsky* could not have met the five year test. However, the phrase "the active conduct of a trade or business" and its legal definition is the same in both the 1939 and 1954 Codes. The Second Circuit held that ". . . It is clear that acting as lessor of real property which is rented to others can constitute a trade or business. . . . Absent the limitations of the § 355 regulations, acting as lessor to a related corporation can also constitute an active trade or business within the meaning of § 112(b)(11)." 303 F. 2d 14, at 22.

Thus, there is a definite conflict on similar facts on this issue between the First Circuit on the one hand and the Second Circuit in *Parshelsky* and the Sixth Circuit in *King, infra,* on the other.

3. The Government recognizes (Brief, p. 7) the distinction in the views of the First and Second Circuits on the issue of whether a noncorporate (*i.e.*, estate planning) purpose is a valid business purpose in determining whether a distribution is principally a device for the distribution of corporate profits (Brief, p. 7). Thus, the Government seems to agree that a conflict exists on this issue between *Parshelsky, supra,* and the instant case.

4. The Government attempts to distinguish *King* v. *Commissioner of Internal Revenue,* F. 2d (1972) (Pet. Supp. Memo. App.), on the basis of "substantially different facts." (Brief, p. 7.) But what is significant, and overlooked by the Government, is the character of the activities of the subsidiaries in *King,* and not their duration or absolute number. The fact that they had been in business for more than five years is irrelevant under the statutory test. The number of construction projects is not important. What is critical is the character of the activities conducted in each project. The activities of the *King* subsidiaries on each project were substantially identical with Teragram's activities. Here again, a conflict in Circuits exists.

The Government has distorted the *Parshelsky* and *King* decisions and has attempted to obscure the obvious conflicts with the instant case. Therefore, the need for review by this Court is imperative.

Respectfully submitted,

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